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Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (previously known as Dai-Ichi Shokai) & Ors

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HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1074–07 OF 2012
NOORIN BADARUDDIN J
21 FEBRUARY 2019

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Damages — Assessment — Date of assessment of damages — Plaintiff sued for specific performance of agreement to sell land — Court granted plaintiff damages in lieu of specific performance as defendant sold part of land to third party — Whether date of defendant's sale and purchase agreement with third party date of breach — Whether damages payable to plaintiff difference between agreed purchase price and market value of land on the date of breach — Whether no damages could be granted to third party against plaintiff as it failed to prove its loss

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The first defendant ('D1') owned all the shares in the second defendant ('D2') which owned a piece of land ('the land') on which it operated a 36-hole golf course with club house. The plaintiff entered into negotiations with D1 to buy the land and D1's shareholding in D2 for a total sum of USD25.3m. The parties signed a memorandum to that effect in Hong Kong ('the HKM'). Thereafter, when D1 showed disinterestedness in the matter, the plaintiff filed the instant suit for specific performance of the HKM, naming D1 and D2 as defendants. The plaintiff also entered a private caveat on the land and obtained an injunction preventing the defendants from dealing with the land. However, just before the plaintiff had obtained the injunction, D2 signed a sale and purchase agreement ('SPA') to sell a portion of the land to the third defendant ('D3'). The court allowed D3 to intervene and be added as a defendant in the suit. The court granted the plaintiff damages (to be assessed) in lieu of specific performance since it was not possible for the plaintiff to acquire the entire land given D3's SPA. The court also agreed with D3 that the plaintiff had no caveatable interest in the portion that it had bought from D2 and ordered the caveat to be removed and damages due to D3 to be assessed. Pursuant to those two orders, the instant applications concerned notices of assessment of damages filed by the plaintiff ('encl 183') and by D3 ('encl 181'). In respect of encl 183, the plaintiff tendered a valuation report by a licensed valuer fixing the total market value of the land with vacant possession as at 11 September 2012 (the date of D2's SPA with D3) as RM180m. D1 did not challenge the valuation report on the basis that its agreement with the plaintiff was only for the sale of its shares in D2 and not for the sale of the land. D1 said the assessment of damages should therefore only concern the shares and not the land, and since the plaintiff had not tendered any evidence with regard to the

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shares, its claim must fail. In respect of encl 181, D3 claimed RM72.8m against the plaintiff for alleged loss of revenue/profits it had suffered due to the plaintiff's caveat on the land. D3 claimed the caveat had adversely affected the sales of residential properties it had built on the land. The plaintiff called for D3's claim to be dismissed for being highly speculative and devoid of proof.

Held, granting the plaintiff RM101,570,000 as damages for loss of value of the land and dismissing D3's notice of assessment for damages (encl 181):

(1) The plaintiff had discharged its burden of proving the actual loss and damage it suffered as a result of D1's breach of the HKM. The plaintiff's valuation report was unchallenged. The plaintiff was accordingly entitled to RM101,570,000 being the loss and damage it suffered as at 11 September 2012. That sum was the difference between the market value of the land (RM180m) as at 11 September 2012 and the consideration set out under the HKM (USD25.3m). Based on the exchange rate of 3.1000 on 11 September 2012 from the Central Bank of Malaysia, USD25.3m was equivalent to RM78,430,000. The exchange rate submitted by the plaintiff was not challenged by D1. The sum awarded was fair and reasonable to compensate the plaintiff for the loss of value of the land as at the date of breach by D1 of the HKM and it would put the plaintiff in the position it would have been, had D1 not breached the HKM (see paras 83–86 & 71).

(2) The plaintiff had contracted to buy the entire issued and paid-up shares in D2 via the HKM for USD25.3m. However, specific performance of the HKM was refused to the plaintiff because of the SPA entered into between D2 and D3 on 11 September 2012 over a portion of the land. As such, the damages had to be assessed as at 11 September 2012 being the date the HKM was lost to the plaintiff by its being deprived of the opportunity to buy and develop the land. If D2 and D3 had not entered into the SPA, specific performance would have been granted to the plaintiff. D2 would not have entered into the SPA without D1's approval since D2 was fully owned and controlled by D1 (see para 60).

(3) Apart from merely listing down its damages in two affidavits, D3 had not exhibited any documentary evidence to substantiate its claim for loss/damages suffered as a result of the plaintiff's caveat. The RM72.8m it claimed was purely speculative. D3 had failed to demonstrate any infringement of its right entitling it to damages nominal or otherwise (see paras 87, 96 & 101).

(4) D1 had failed to support its contention that the assessment should be solely for damages in lieu of specific performance of the sale of the shares and not the land. The judgment of the High Court, which remained undisturbed and must be taken to be the truth of the matter between the parties, showed that the dispute between the parties concerned the sale

and purchase of the golf course/the land which was to be concluded by way of sale of D1's shares in D2 as the land was the only asset of D2. The transaction included the land as the value of the shares was intricately linked to the value of the land. The judgment of the High Court on causation and liability was not reversed or set aside on appeal. D1 did not appeal against the decision of the High Court. On the plaintiff's appeal against its failure to obtain specific performance, the Court of Appeal did not say that the HKM was not about the land. As found by the High Court, the plaintiff's loss was the land which it failed to obtain for development because of the SPA between D2 and D3. The specific performance was for the land. If the issue was not the land, the parties would not have discussed the question of quit rent and assessment during the negotiations. If it was purely about the sale of shares, the High Court would have granted the specific performance (see paras 31–32, 43–44, 46, 51–53, 55 & 57–58).

[Bahasa Malaysia summary

Defendan pertama ('D1') memiliki semua saham dalam defendan kedua ('D2') yang memiliki sebidang tanah ('tanah') di mana ia mengendalikan sebuah padang golf 36 lubang dengan rumah kelab. Plaintif memasuki rundingan dengan D1 untuk membeli tanah tersebut dan pegangan saham D1 dalam D2 untuk sejumlah USD25.3 juta. Pihak-pihak menandatangani memorandum untuk itu di Hong Kong ('HKM'). Selepas itu, apabila D1 menunjukkan sikap tidak berminat dalam hal tersebut, plaintif memfailkan saman ini untuk pelaksanaan spesifik HKM, menamakan D1 dan D2 sebagai defendan. Plaintif juga memasuki kaveat peribadi di atas tanah tersebut dan memperoleh injunksi yang menghalang defendan daripada berurusan dengan tanah tersebut. Walau bagaimanapun, sebelum plaintif mendapat injunksi, D2 menandatangani perjanjian jual beli ('SPA') untuk menjual sebahagian tanah kepada defendan ketiga ('D3'). Mahkamah membenarkan D3 untuk campur tangan dan ditambah sebagai defendan dalam guaman tersebut. Mahkamah membenarkan ganti rugi plaintif (untuk dinilai) sebagai ganti pelaksanaan spesifik kerana tidak mungkin bagi plaintif memperolehi keseluruhan tanah memandangkan SPA D3. Mahkamah juga bersetuju dengan D3 bahawa plaintif tidak mempunyai kepentingan berkaveat dalam bahagian yang telah dibeli dari D2 dan memerintahkan kaveat dikeluarkan dan ganti rugi kepada D3 untuk dinilai. Menurut kedua-dua perintah tersebut, permohonan ini berkenaan notis penilaian kerugian yang difailkan oleh plaintif ('lampiran 183') dan oleh D3 ('lampiran 181'). Berkenaan dengan lampiran 183, plaintif mengemukakan laporan penilaian oleh seorang penilai berlesen yang menetapkan jumlah nilai pasaran tanah dengan pemilikan kosong pada 11 September 2012 (tarikh SPA D2 dengan D3) sebanyak RM180 juta. D1 tidak mencabar laporan penilaian berdasarkan perjanjian dengan plaintif hanya untuk penjualan sahamnya dalam D2 dan bukan untuk penjualan tanah tersebut. D1 berkata penilaian ganti rugi sepatutnya hanya berkaitan dengan

saham dan bukannya tanah, dan kerana plaintif tidak mengemukakan apa-apa bukti berkenaan dengan saham tersebut, tuntutannya harus gagal. Berkenaan dengan lampiran 181, D3 menuntut RM72.8 juta terhadap plaintif kerana dakwaan kehilangan hasil/keuntungan yang telah dialaminya kerana kaveat plaintif di atas tanah tersebut. D3 mendakwa bahawa kaveat telah menjejaskan jualan harta kediaman yang telah dibina di atas tanah tersebut. Plaintif meminta tuntutan D3 untuk ditolak kerana sangat spekulatif dan tidak mempunyai bukti.

Diputuskan, membenarkan plaintif RM101,570,000 sebagai ganti rugi untuk kehilangan nilai tanah dan menolak notis penilaian D3 untuk ganti rugi (lampiran 181):

(1) Plaintif telah melepaskan bebannya untuk membuktikan kerugian sebenar dan kerosakan yang dialami akibat pelanggaran HKM oleh D1. Laporan penilaian plaintif tidak dicabar. Plaintif sewajarnya berhak kepada RM101,570,000 sebagai kerugian dan kerosakan yang dialami pada 11 September 2012. Jumlah tersebut adalah perbezaan antara nilai pasaran tanah (RM180 juta) pada 11 September 2012 dan pertimbangan yang ditetapkan di bawah HKM (USD25.3 juta). Berdasarkan kadar pertukaran 3.1000 pada 11 September 2012 dari Bank Negara Malaysia, USD25.3 juta bersamaan dengan RM78,430,000. Kadar pertukaran yang dikemukakan oleh plaintif tidak dicabar oleh D1. Jumlah yang diberikan adalah adil dan munasabah untuk membayar pampasan kepada plaintif untuk kehilangan nilai tanah pada tarikh pelanggaran oleh D1 HKM dan ia akan meletakkan plaintif dalam kedudukan itu, jika D1 tidak melanggar HKM (lihat perenggan 83–86 & 71).

(2) Plaintif telah berkontrak untuk membeli keseluruhan saham terbitan dan berbayar di D2 melalui HKM untuk USD25.3 juta. Walau bagaimanapun, pelaksanaan spesifik HKM ditolak kepada plaintif kerana SPA yang dibuat antara D2 dan D3 pada 11 September 2012 di atas sebahagian tanah. Oleh itu, ganti rugi perlu dinilai pada 11 September 2012 yang menjadi tarikh HKM hilang kepada plaintif dengan kehilangan peluang untuk membeli dan membangunkan tanah tersebut. Sekiranya D2 dan D3 tidak memasuki SPA, pelaksanaan spesifik akan diberikan kepada plaintif. D2 tidak akan memasuki SPA tanpa kelulusan D1 kerana D2 dimiliki sepenuhnya dan dikawal oleh D1 (lihat perenggan 60).

(3) Selain hanya menyenaraikan ganti rugi dalam dua afidavit, D3 tidak membawakan apa-apa keterangan dokumentari untuk membuktikan tuntutannya atas kehilangan/ganti rugi yang dialami akibat dari kaveat plaintif. RM72.8 juta yang dituntut itu adalah spekulatif semata-mata. D3 telah gagal untuk menunjukkan apa-apa pelanggaran haknya untuk

melayakkan ganti rugi nominal atau sebaliknya (lihat perenggan 87, 96 & 101).

(4) D1 telah gagal menyokong perdebatannya bahawa penilaian tersebut semata-mata untuk ganti rugi sebagai ganti pelaksanaan spesifik penjualan saham dan bukannya tanah. Penghakiman Mahkamah Tinggi, yang tetap tidak terganggu dan harus diambil untuk menjadi kebenaran perkara antara pihak-pihak, menunjukkan bahawa pertikaian antara pihak-pihak berkenaan dengan penjualan dan pembelian lapangan golf/tanah yang akan diselesaikan oleh cara penjualan saham D1 dalam D2 kerana tanah adalah satu-satunya aset D2. Urus niaga ini termasuk tanah kerana nilai saham dikaitkan dengan nilai tanah. Penghakiman Mahkamah Tinggi mengenai penyebab dan liabiliti tidak diterbalikkan atau diketepikan atas rayuan. D1 tidak merayu terhadap keputusan Mahkamah Tinggi. Mengenai rayuan plaintif terhadap kegagalannya untuk mendapatkan pelaksanaan spesifik, Mahkamah Rayuan tidak mengatakan bahawa HKM bukan mengenai tanah tersebut. Seperti yang diputuskan oleh Mahkamah Tinggi, kerugian plaintif adalah tanah yang gagal untuk mendapatkan pembangunan kerana SPA antara D2 dan D3. Pelaksanaan spesifik adalah untuk tanah tersebut. Sekiranya isu adalah bukan tanah, pihak-pihak tidak akan membincangkan persoalan cukai tanah dan penilaian semasa rundingan. Sekiranya ia semata-mata mengenai penjualan saham, Mahkamah Tinggi akan membenarkan pelaksanaan spesifik (lihat perenggan 31–32, 43–44, 46, 51–53, 55 & 57–58).]

Notes

For a case on date of assessment of damages, see 6(1) *Mallal's Digest* (5th Ed, 2015) para 314.

Cases referred to

Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly TravelPlan SAU) of Spain; The New Flamenco [2018] 1 ALL ER 45, SC (distd)

Inter Diam Pte Ltd v PJ Diamond Centre Sdn Bhd [2002] 7 MLJ 189; [2002] 4 CLJ 715, HC (refd)

Jeffery Law Siew Su & Ors v Yu Gui [2017] 3 MLJ 1, FC (refd)

Johnson & Anor v Agnew [1980] AC 367, HL (refd)

Kamdar Sdn Bhd v Bipinchandra all Balvantrai & Ors [2016] MLJU 974; [2017] 1 CLJ 369, CA (refd)

Lee Tiow Kee & Anor v Ng Geok Hwa [2017] 4 MLJ 92, CA (refd)

Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd [2017] 1 MLJ 418, CA (distd)

Lo Foi v Lee Ah Hong @ Lee Lum Sow & Ors [1997] MLJU 310; [1998] 1 CLJ Supp 244, HC (refd)

Majlis Amanah Rakyat & Anor v Mat Nawi bin Awang and another appeal [2017] 1 MLJ 500, CA (refd)
Mawar Biru Sdn Bhd v Lim Kai Chew [1992] 1 MLJ 336, HC (refd)
Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd [2016] 3 MLJ 708; [2016] 6 CLJ 508, CA (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360, HC (refd)
Riviera Promotions Sdn Bhd v Genting Perkasa Sdn Bhd & Ors [2016] 6 MLJcon 131; [2012] 9 CLJ 208, HC (refd)
Syed Abu Bakar bin Ahmad v Public Prosecutor [1984] 2 MLJ 19, FC (refd)
U Television Sdn Bhd & Anor v Comintel Sdn Bhd [2017] 5 MLJ 292, FC (refd)

Legislation referred to

Contracts Act 1950 s 74
National Land Code ss 326, 327, 329(1)
Rules of Court 2012 O 37 r 1, O 40A rr 3, 4, O 41 r 5
Specific Relief Act 1950 s 18

Rishwant Singh (Noor Muzalifah Shabudin with him) (Cecil Abraham & Partners) for the plaintiff.
Edward Kuruvilla (Christopher & Lee Ong) for the first defendant.
Tan Jee Tjun (Thomas Philip) for the third defendant.

Noorin Badaruddin J:

[1] Enclosures 181 and 183 are notices for assessment of damages filed by the third defendant and the plaintiff accordingly pursuant to O 37 r 1 of the Rules of Court 2012 ('the ROC').

[2] The applications are brought pursuant to the High Court order ('the order') of 11 March 2014 in these proceedings.

[3] In regards to the plaintiff, the order provides amongst others as follows:

> ... AND FURTHER IT IS ADJUDGED that the 1st Defendant do pay the Plaintiff —
>
> (a) damages in lieu of specific performance to be assessed;
>
> (b) the sum of RM841,691.94 ... as expenditure incurred by the Plaintiff in this transaction; and
>
> (c) costs of RM150,000.00 ...

[4] A point to note is that the first defendant has not paid the sum awarded in para (b) or costs in para (c) of the order.

[5] Having not received payment of the sum, the plaintiff proceeds to assess its damages in lieu of specific performance pursuant to para (a) of the order.

[6] In regards to the third defendant, essentially, the assessment is in respect of damages suffered by reason of the plaintiff's entry of the caveat over particular pieces of lands from 30 May 2012 until its removal on 9 June 2014. The order reads as follows:

> (a) A declaration that the Hong Kong Memorandum does not give rise to a legal interest in a part of the land held under HS (D) 195059 PTD 59410 PTD 59409, in the Mukim of Pulai, District of Johor Bharu, in the State of Johor, measuring approximately 104 acres (from the whole 166 acres therein ('the land');
>
> (b) a declaration is hereby given that the Plaintiff has no caveatable interest in the Walker Land;
>
> (c) The Registrar of Titles be directed to remove Private Caveat No 181130/212 dated 30.5.2012 entered against the Walker Land within 7 days from the date of the Order;
>
> (d) damages to be assessed;
>
> (e) costs of RM50,000.00 (Ringgit Malaysia FiftyThousand) to be paid by the Plaintiff to the 3rd Defendant;
>
> ...

BRIEF FACTS

[7] The plaintiff is a company registered in Malaysia. The first defendant is a company incorporated in Japan.

[8] At all material times, the first defendant owned the entire issued and paid up shares capital of the second defendant.

[9] The second defendant is a company incorporated in Malaysia and operates a 36-hole golf course together with a club house as well as managing the membership of the said golf course resort known as Poresia Country Club ('the club') on a piece of land which is the main asset of the second defendant held under:

(a) GRN 333802, Lot 74596 Mukim Pulai;

(b) HSD 195059, PTD 59409 and PTD 59410 Mukim Pulai;

(c) GRN 333816, Lot 74593 Mukim Pulai;

(d) GRN33817 Lot 74594 Mukim Pulai; and

(e) GRN333818 Lot 74595 Mukim Pulai ('the land').

[10] The third defendant is a company incorporated in Malaysia and had entered into an option to purchase from the second defendant a part of the land (HS (D) 195059 PTD 59409 and PTD 59410 Mukim Pulai) measuring approximately 166 acres.

[11] The sale and purchase of the land was the subject matter of the dispute between the parties. The sale and purchase of the land was negotiated between the plaintiff and the first defendant and to be concluded by way of sale of the shares in the second defendant by the first defendant as set out under the Hong Kong memorandum ('HKM') dated 16 March 2012 executed in Hong Kong for a consideration of US$25.3m.

[12] After active negotiations, the first defendant requested for increased of the consideration price from US$25.3m to US$27m. The increase was agreed to by the plaintiff on a goodwill basis. Unfortunately the offer by the plaintiff was rejected by the first defendant as it was communicated to them 20 minutes after the deadline.

[13] The plaintiff through its solicitors issued a demand that the share sale transaction proceeds as agreed. However, the first defendant failed, refused and/or neglected to do so. The plaintiff filed the suit claiming, inter alia, that there was a binding agreement between the parties for the sale and purchase of the second defendant's entire share and by extension, the land owned by the second defendant.

[14] To protect the interest on the land, the plaintiff entered a private caveat ('the private caveat') on 4 June 2012 and obtained an injunction on 19 September 2012 restricting the first and second defendant of any dealings with the land and any initiation proceedings for the removal of the caveat.

[15] Meanwhile, the second defendant had entered into an option to purchase with the third defendant for the sale and purchase of a portion of the land and on 11 September 2012, the second and the third defendants entered into a sale and purchase agreement right before the injunction became enforceable.

[16] On 11 July 2012, the plaintiff brought an action in the High Court against the first defendant to obtain specific performance of the HKM.

[17] On 11 January 2013, the third defendant applied to intervene and on 30 January 2013 the High Court allowed intervention by the third defendant. On 11 March 2014, the High Court dismissed the plaintiffs claim for specific performance of the HKM against the first and second defendants and ordered

for damages to be assessed in lieu of specific performance. The High Court allowed the third defendant's counterclaim.

SUMMARY OF THE PLAINTIFFS CONTENTIONS

Enclosure 183

[18] The plaintiff submits that it is entitled to damages for the following reasons:

(a) at all material times, the first defendant was aware of the plaintiffs intention to develop the land by reference to the background facts and the conduct of court proceedings;

(b) there is a comprehensive, structured and well-reasoned valuation report produced by the plaintiff in determining the market value of the land for the purposes of this assessment proceedings;

(c) the plaintiff has discharged its burden in proving the actual damages and/or losses suffered as a result of the first defendant having breached the HKM;

(d) the expert's affidavit complies with the requirements set out under O 40A r 3 of the Rules of Court 2012 ('the ROC'). The first defendant has not filed an affidavit in reply to contest the issues of fact arising;

(e) the first defendant for reasons unexplained, has failed and/or refused and/or neglected to respond to the plaintiff's expert's affidavit. Accordingly, there is no evidence to challenge or contradict the plaintiff's valuation report;

(f) the first defendant did not seek leave of the court to question the expert on the contents of the valuation report pursuant to O 40A r 4 of the ROC. In so acting, therefore, the solicitors for the first defendant is restrained from challenging the valuation report;

(g) the first defendant did not seek to cross-examine the affiants of the plaintiff affidavits despite having the opportunity to do so on various occasions; and

(h) accordingly, the plaintiff is entitled to damages and/or losses suffered and other costs incurred in this assessment proceedings.

Enclosure 181

[19] It is the plaintiff's submission that the third defendant has failed to prove that it has suffered any loss for the following reasons:

(a) the third defendant merely lists down the losses it alleges to be its damage without actually adducing any documentary evidence to substantiate its claim;

(b) the nature of the evidence of loss is such that it is outside the range of common human experience. The third defendant has not adduced any expert evidence to demonstrate the loss it claims it has suffered;

(c) the third defendant's first affidavit has been credibly denied by the plaintiff's affidavit in reply. The principles of evaluation of affidavit evidence is not in dispute; all disputed averments on affidavit must be set to one side and the court must determine the question of damages premised on the admitted averments on affidavit. On the plaintiff's facts, it is submitted that there are no averments on affidavit;

(d) the averments in the third defendant's two affidavits are bare averments devoid of any evidence. The averments of loss are akin to the third defendant writing down the particulars of alleged loss, throwing the particulars at the head of the court saying This is what I have lost; I ask you to give me these damages';

(e) the damage and/or loss alleged by the third defendant is speculative;

(f) the purported loss of revenue claimed by the third defendant is at best an estimation, not the real and actual loss suffered by the third defendant as a result of the entry of the private caveat;

(g) the third defendant has failed to demonstrate that the entry of the private caveat has caused the cluster homes and/or semi-detached homes to be sold at a lesser price;

(h) the third defendant has failed to demonstrate its intention to develop the land in question by reference to the terms and conditions of the sale and purchase agreement dated 11 September 2012 ('the SPA') that it entered into with the second defendant;

(i) the SPA is a conditional agreement. There are five pre-conditions that must be fulfilled before the SPA becomes unconditional. There is absolutely no evidence before the court that even one of the five preconditions were satisfied;

(j) the third defendant has failed to demonstrate that the second or the third defendant took steps to have the private caveat removed so as to mitigate its alleged damage and/or loss; and

(k) accordingly, the third defendant is not entitled to damages.

SUMMARY OF THE FIRST DEFENDANT'S CONTENTIONS

Enclosure 183

[20] At the very outset, it is the first defendant's contention that the subject matter of the intended sale and purchase agreement pursuant to the HKM with the plaintiff was the sale and purchase of the entire issued shares of the second defendant ('the shares') for the consideration price of USD$25.3m. It is argued that the nature of the assessment of damages in lieu of specific performance before this court relates to the entire shares of the second defendant and not the land. The first defendant highlighted that it is recognised at all material time it was the shares that the plaintiff was seeking for as per their statement of claim.

[21] The first defendant submits that the plaintiffs reliance on the affidavit and expert report is misconceived in law and in fact, as both documents go towards the valuation of the land and not the shares. The first defendant contends that the affidavit and the expert report taken at its best would still mean that there is nothing before the court as to the valuation of the shares at the time of the intended sale and purchase agreement was to be entered into and/or at any time at all. Consequently, it is further argued that the plaintiff has failed to prove their loss and that the losses it suffers is attributable to the first defendant.

[22] It is argued further that since the plaintiff has failed to discharge the burden to prove its losses as well as the burden to prove that the alleged losses are attributable to the first defendant, the issue of the first defendant rebutting or challenging the affidavit and the expert report does not arise.

[23] It is further contended that the expert report is speculative, presumptive and assumptive and as such the court should not rely on the report due to it being 'unsafe'.

SUMMARY OF THE THIRD DEFENDANT'S CONTENTIONS

[24] It is the third defendant's contention that the damages that it is seeking for are reasonably foreseeable and not too remote. The third defendant submits that they had acquired the land for the sole purpose of development and the development was hindered by the entry of the plaintiffs caveat. The losses they suffered is said to be essentially the difference in the profits had the development of the land took place in timely fashion (but did not by reason of the caveat) and that it was able to launch the first phase of the development of

the land in June 2013. The third defendant asserts that such losses are not remote given that the failure to launch the development was a direct result of the entry of the caveat.

[25] It is submitted that if not for the plaintiffs caveat, the third defendant could have sold a total of 90 units of semi-detached homes and 112 cluster homes based on the total sellable area for the semi-detached houses and the cluster homes. The total loss suffered by the third defendant due to the plaintiffs caveat is calculated to be above RM72,776,000.

EVALUATION AND FINDINGS

Enclosure 183

[26] At the outset, this is a case premised on a breach of contract. It is trite that damages for such breach is to place the aggrieved party in a position as if the contract was performed. Section 74 of the Contracts Act 1950 provides:

> 74 Compensation for loss or damage caused by breach of contract
>
> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[27] The common law position is not dissimilar. In *Chitty on Contracts* (32nd Ed, Vol 1) at para 27-085, it is stated:

> In *Johnson v Agnew* the House of Lords accordingly expressed the view that the assessment of damages was governed by the same principles whether the damages were awarded under the Act or at common law. Even at common law damages are not invariably assessed by reference to the date of breach. This method of assessment is adopted where it would have been reasonable for the claimant to have mitigated his loss, at that date e.g. by making a substitute contract; but if, for some reason, this is not the case, the damages will be assessed by reference to some other date.

[28] In *Johnson & Anor v Agnew* [1980] AC 367, the House of Lords stated as follows:

> The general principle for the assessment of damages is compensatory ie that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach — a principle

recognized and embodied in section 51 of the Sale and Goods Act 1893. But this is not an absolute rule; if to follow it would give rise to an injustice, the court has power to fix such other date as may be appropriate in the circumstances.

[29] The plaintiff was awarded 'damages in lieu of specific performance' to be assessed. The power for the court to grant such damages is prescribed in s 18 of the Specific Relief Act 1950 which states:

> 18 Power to award compensation in certain cases
>
> (1) Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, its performance.
>
> (2) If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.
>
> ILLUSTRATION
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> ...
>
> (3) If in any such suit the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.
>
> ILLUSTRATION
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> ...
>
> (4) Compensation awarded under this section may be assessed in such a manner as the court may direct.
>
> (5) The circumstance that the contract has become in capable of specific performance shall not preclude the court from exercising the jurisdiction conferred by this section.
>
> ILLUSTRATIONS
>
> (a) A, a purchaser, sues B, his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The court may award A compensation for the nonperformance of the contract, and may, if necessary, amend the plaint for that purpose.
>
> (b) A sues for the specific performance of a resolution passed by the directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The court may, under this section, award A compensation for the nonperformance.

[30] The principles of damages in lieu of specific performance can be gleaned from the decision of the Court of Appeal in *Riviera Promotions Sdn Bhd v Genting Perkasa Sdn Bhd & Ors* [2016] 6 MLJcon 131; [2012] 9 CLJ 208 where Azahar Mohamed JCA (as His Lordship then was) stated as follows:

> [11] Damages in lieu of specific performance are damages that would substitute the relief of specific performance. It is damages in equity. It is intended to place the plaintiff in the same position it would have been had the defendants not breached the SPA by refusing to execute and thereafter perform the same. It is damages that represent the potentiality or the value of the property if the court had ordered specific performance (see *Wroth v Tyler* [1974] Ch 30, *Johnson v Agnew* [1980] AC 367, *Hickey v Bruhns* [1977] 2 NZLR 71, *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777; [1995] 1 CLJ 15).

[31] Before embarking on the assessment in granting the damages in lieu of specific performance, it is absolutely necessary to have a proper appreciation of the judgment of the learned High Court judge after the full trial. It is apposite to note that the findings of the learned High Court judge remain undisturbed and as such is res judicata. The judgment must be taken as the truth of the matter between the parties herein and the order granted must be adhered to.

[32] It is crystal clear that the second defendant owns the land and that the third defendant bought part of the land. Consequently, the plaintiff who has entered into the HKM for the sale and purchase of the land which is more than what the third defendant had bought, lost its right to acquire the land as the agreement fell through. That background facts where the plaintiff was halted from obtaining the land can be found in the judgment of the learned High Court judge as follows:

> To protect its interest on the said Land, the plaintiff entered a private caveat on 4 June 2012 and obtained an injunction on 19 September 2012 restricting the 1st and second defendant of any dealings with the land and any initiation proceedings for the removal of the caveat. In spite of having notice of the plaintiff's interest, the second defendant entered into an option to purchase with the third defendant for the sale and purchase of a portion of the land. On 11 September 2012, the second defendant and the third defendant entered into a sale and purchase agreement right before the injunction became enforceable.

[33] It is important to reproduce these important excerpts of the judgment of the learned High Court judge where Her Ladyship found the followings:

> The solicitors of the plaintiff and the first defendant vetted as well as proposed amendments and exchanged comments. The preparation of the draft continued even when a new solicitor was appointed by Mr Sugiki. *During the rigorous discussions and amendments the shares and the golf course as well as the price had always remained as the core of the negotiations.*

A In his WS PW1 told the Court that after the aborted execution of the SPA on 23 March 2011, he had communicated with Mr Sugiki via telephone as well as by e-mails dated 8 November 2012 (translated by PW1) Mr Sugiki confirmed that he intended to sell the land and the membership. (Emphasis added.)

B **[34]** Mr Sugiki ('DW2') is a director of the first defendant. Apparently, in the email dated 8 November 2012, Mr Sugiki confirmed as follows:

There were many things on the way to here. Now I can confer (with the party) (about the Poresia Deal). (the deal) is (a deal of) sale and purchase of the land and building, member included, price is three billion Japanese yen (or Japanese Yen 3,000million)

C If you compare the market price at nearby location, I think that is cheap. Give me answer. Sale and purchase of the share (or stock) is not considered. (Emphasis added.)

D **[35]** Then the learned High Court judge found that PW1 (Mr Kameda Sakae, Senior Adviser with Itochu Hong Kong Ltd who acted as intermediary between the parties as DW2 cannot read or understand English) subsequently sent another e-mail dated 10 November 2012 enquiring the reasons for the change of terms in particular the sale price. Mr Sugiki replied in an e-mail dated E 13 November 2012 stating, inter alia, the followings:

(I) understand the proposal. But (US)$30 million is not accepted. If it Is (US)40 million, I will take it

F *It is land and building with members. It is cheaper than market value of nearby locations. (Emphasis added.)*

[36] The learned High Court judge further found that:

G It was through Mr Kameda that PW5 was informed that *Mr Sugiki wanted to sell the golf course and suggested that the plaintiff purchased the entire issued shares of the second defendant*. (Emphasis added.)

[37] Contrary to the contention of the first defendant, this court finds that H the learned High Court judge had made a finding of fact that it is without a doubt the core of the negotiations between the plaintiff and the first defendant had always been the shares and the purchase of the golf course which means the land. In fact, one of the terms ultimately acceded to by the parties, was for the plaintiff to pay quit rent and property assessment up to 2012. The learned I High Court judge found that from the defendant's own witness DW1 (Kumihiko Makita, a retired Japanese diplomat and a friend of DW2 for more than 30 years), the transaction 'Includes the land as the value of the shares is intricately linked to the value of the land'.

[38] Although in evidence, DW2 stated that the first defendant had only agreed to sell the shares to the plaintiff and that there was never the intention to sell the land, based on the contemporaneous documents, the learned High Court judge found that the intention of the parties in particular PW5 (Mr Lee Seng Huang, Executive Chairman of Mulpha International Bhd where the plaintiff is a wholly owned subsidiary of Mulpha) and DW2 is the sale and purchase of the shares together with the land.

[39] Before arriving at that finding, the learned High Court judge had considered the facts that there were continued discussions evidenced from emails exchanged between the plaintiff's and the first defendant's solicitors. Apparently, from the emails exchange, apart from the sale of the land which was the only asset of the second defendant, there were reference made to the liabilities of the second defendant as well during the negotiations.

[40] Those findings of fact and evidence as far as they are relevant herein are extracted below:

> By an e-mail dated 26 March 2012, Mr Yap Wai Ming (the newly appointed solicitor of the first defendant) raised the following seven issues:
>
> (i) ...
>
> (ii) ...
>
> (iii) ...
>
> (iv) ...
>
> (v) The first defendant wanted the plaintiff to pay quit rent and property assessment up to 2012;
>
> (vi) ...
>
> (vii) ...
>
> ...
>
> Throughout the cross-examination PW5 gave evidence that he and Mr Sugiki had at all times, agreed to the salient terms of the sale transaction at the time of signing of the Hong Kong MOU and *that the intention of the sale transaction from the very beginning was to purchase the golf course* ...
>
> ...
>
> Despite the sudden change of solicitors on 23 March 2012, there were still active discussions on the draft SPA. *There was no indication of any major comments neither was there any issue that the transaction did not include the land* by the solicitor of the first defendant.
>
> ...

Notwithstanding that the SPA was not executed on the date as agreed pursuant to the Hong Kong MOU, the solicitors continued discussing the draft SPA as evidenced from the e-mails exchanged between the two lawyers. DW3 sent an e-mail dated 28 March 2012 to PW2 and raised further issues as follows,

(i) 50% of the fees collected as its commission;

(ii) Daiichi Shokai Co. Ltd. will set up a branch office in Singapore and open a bank account;

(iii) ...

(iv) ... ; and

(v) Taxation claim

...

PW2 in his Witness Statement, stated that the two solicitors were sorting out the administrative issues relating to methods of payment and other ancillary issues. However, by an e-mail dated 9.4.2012 (Re: pg 82 A1) the first defendant requested for the consideration price of the share sale transaction to be reverted back to USD27 million as per the earlier MOU and gave the plaintiff a deadline until 10.4.2012 to respond. This was subsequently followed by another e-mail dated 19.4.2012 (Re: pg 274 C2) from DW3 which reads,

...

Dear Soo Chye

I have instructions from my clients as follows:

1. Our clients apologize for the mistaken perception on the treatment of the inter-company debts. The meeting in Hong Kong which culminated in the memorandum to reduce the purchase price by the set-off of the intercompany debts between RPSLPL/NGU to RPB. After our clients had the benefit of consulting with their auditors, this intercompany debt will be resolved as follows:

a. RPB currently has more than RM49m in retained profits. RPB will declare an interim dividend of RM8m to NGU

b. NGU will on-lend about RM7.5m to RPSPL

c. RPSPL will use the RM7.5m to repay its debt to RPB

d. NGU will use the balance RM0.5m to set off against the outstanding loan from RPB.

e. The net result is that a tripartite agreement will be signed between RPB, RPSPL and NGU to cancel these debts via the dividend payment

While our clients recognize that this has the same effect of reducing the net asset value of RPB by the amount of the dividend declared, their understanding has always been that RPB is to be sold as it is for the value of US$27m. Our clients informed us that they have clarified this position to Mr Kameda.

...

DW1 also attended the meeting on 23 March 2012 merely as an observer. In his Witness Statement, he said that DW2 informed him that he was not interested to negotiate further and one of the reasons as stated in the Witness Statement is that '... The purchase price offered by Mr Lee Seng Huang for the purchase of Resort Poresia Bhd was below market price, as the land owned by Resort Poresia has a higher market value ...'.

This statement made by DW1 in his Witness Statement evidenced that the transaction included the land as the value of the shares is intricately linked to the value of the land.

[41] It is highlighted through the expert (valuation) report that the club is surrounded by land already developed by the plaintiff known as Leisure Farm Resort, a private gated and guarded residential resort comprising amongst others holiday homes, bungalow, townhouses, low rise resort apartments, stratified landed development, detached house plots, an equestrian resort and a club house cum sales office as well as other related recreational facilities. The club is strategically located within Zone B of Iskandar Malaysia (a special economic zone located in the south of Johor) and bounded by a mega township development within Iskandar Malaysia known as Iskandar Puteri. Iskandar Puteri is actively being developed with a number of catalyst developments, amongst others the Johor State New Administrative and Educity. Other completed developments include hospitals, international destination resorts with signature developments such as Legoland Malaysia resorts and an integrated residential and commercial development together with an international class marina. Other prominent landmarks located within the vicinity of the club include the second port of Johor known as Port of Tanjung Pelepas which is one of the region's largest container yards and the Sultan Abu Bakar Customs, Immigrations & Quarantine Complex which is the Malaysian checkpoint for travelers to and from Singapore via the Second Link. There were also major housing schemes and high-end condominium developments in the larger locality of the club. Also located in the locality are several industrial schemes namely Nusa Cemerlang Industrial Park.

[42] It is apparent that the sale and purchase of the golf course which constitutes the land was a commercial decision taken by the plaintiff to complement its existing development around the club and to add value to its existing business. As such it can be seen from the evidence clearly laid down by the learned High Court judge in her judgment that the parties had in no uncertain terms agreed to purchase and sell the entire issued shares which includes the land of the second defendant.

[43] The learned High Court judge found that the land was specifically identified in the HKM as well as in the draft sale and purchase agreement prepared and vetted. It was also found that there was a consensus *ad idem* as to the subject matter and the agreed purchase price consideration. The purchase

price of the second defendant, the market value, the quit rent and assessment as well as the debts/liabilities formed part of the discussion. As found by the learned High Court judge, those matters discussed were clear indication that the transaction include the sale of the land being the only asset of the second defendant. The High Court further found that there were certainty of price and property which include the shares and the golf course/the land. The learned High Court judge further stated that:

> Although the terms and conditions of the agreement are not embodied in a formal contract, a valid and binding agreement had been concluded between the parties.

[44] Reading the entire judgment of the learned High Court judge, this court finds that the whole dispute between the parties before the court was the sale and purchase of the golf course/the land to which the sale and purchase was negotiated and to be concluded by way of sale of the shares in the second defendant by the first defendant as per the HKM. The golf course is the only reason or target asset of the second defendant. In commercial reality, it is not uncommon that in purchasing a property more so the sole property of a company, the effect of such purchase is made by purchasing the entire shares and paid up shares of the company.

[45] In arguing that the subject matter of the sale and purchase agreement between the parties was not the land but instead it was purely the shares, the first defendant's learned counsel relied on the plaintiff's pleaded case and the judgment of the Court of Appeal. It is contended that what the plaintiff had been seeking for has always been the shares. The learned counsel finds support from the following excerpts of the judgment of the Court of Appeal as follows:

> [5] So far as could be seen from the appellants' re-amended statement of claim, *the appellant's contention is that the HK MOU was in fact and in law a valid, definitive, binding and enforceable agreement for the sale of the shares by the first respondent to the appellant*
>
> [6] Upon the basis of these claims, the appellant brings this action seeking by way of relief relevantly:
>
> (a) as against the first respondent, an order for:
>
> (i) specific performance of the sale and purchase agreement originally to be executed on 23 March 2012 between the appellant and the first respondent *for the sale and purchase of the entire issued shares of the second respondent for the consideration price of USD25.3m:*
>
> ...
>
> [11] ... Therefore, with regard to the aforesaid question, we accept that specific performance of the agreement for *the sale and purchase of the shares* between the appellant and the first respondent is no longer possible
>
> ...

[12] Following this turn of event, and on the facts of the present case, our stand is, owing to circumstance which has occurred subsequently, that is, *the shares* are no longer with the first respondent due to the *transfer of the shares* to the third party, no meaningful order of specific performance could in our view, be made by this court and enforced against the first respondent as the subject matter of the purported contract is no longer in existence. *The appellant, furthermore, takes no steps to preserve the shares, and has undoubtedly taken no steps to recover the shares from the present owner*. (Emphasis added.)

[46] The learned counsel for the first defendant argues that as the nature of the assessment must be solely for damages in lieu of specific performance for the sale of the shares, and what the plaintiff has adduced before this court are only the affidavit and expert report as to the land (and not the shares), therefore, the plaintiff has failed to prove its losses. It is further argued that consequence to such failure on the part of the plaintiff, the issue of rebutting the affidavit and expert report does not arise.

[47] The learned counsel finds support in the Court of Appeal case of *Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd* [2017] 1 MLJ 418 where the Court of Appeal set aside the damages awarded by the High Court following the assessment thereof, on the basis that the plaintiff therein did not adequately discharge their burden of proving their losses or proving that the losses were attributable to the defendant. The Court of Appeal through the judgment of Mary Lim JCA held as follows:

[6] After hearing the oral submissions of learned counsel and having considered the written submissions and record of appeal, we were unanimous in allowing the appeal. We agreed with the submissions of the appellant's counsel that the respondent had failed to prove the losses suffered and had further failed to prove that the losses suffered were indeed attributable to the acts of the appellant. The element of causation was still relevant in relation to the assessment of damage, that the respondent had to prove that the particular damage or loss claimed was caused by or attributable to the appellant. Since the respondent failed to do that, the issue of rebuttal by the appellant did not arise.

...

[30] Section 74 requires the respondent to prove that it had suffered loss of profits as a result of the appellant's breach of the confidentiality and non-competition agreement. The respondent must prove that this loss of profit arose naturally in the usual course of things from such breach, or which both parties knew at the time of the making of the contract, that such damage or loss is likely to result from such breach. If this loss is too remote or is an indirect loss, the respondent is not entitled to any compensation, and the court must dismiss the claim, or order nominal damages even if interlocutory judgment has already been entered. There are no free passes to compensation for any claimant, save where there is admission.

A [31] Quite aside from this fundamental principle, the respondent is also required to prove that the losses sustained are caused by the appellant. There must be a causal link or nexus between the loss claimed and the act of the appellant.

B **[48]** The learned counsel further highlights the case of *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly TravelPlan SAU) of Spain; The New Flamenco* [2018] 1 ALL ER 45 where it is submitted that a recent development of the common law is made by the Supreme Court of the United Kingdom in that case. It is highlighted that from that case, the question of causal link is still relevant even at the assessment stage.

C

[49] The case of *Fulton Shipping* cited by the first defendant's learned counsel has to be distinguished. In that case, the owners of a cruise vessel, The New Flamenco' appealed against the decision of the Court of Appeal allowing an
D appeal by the charterers against an arbitral award determining the repudiation of an addendum extending a charter of the vessel by the charterers which had caused the owners to sell the vessel in reasonable mitigation of its losses and that the owners were consequently bound to give credit for the difference between the sale price achieved when the vessel was redelivered and the significantly
E depressed capital value of the vessel if it had been redelivered pursuant to the addendum. The owners advanced their claim for damages calculated by reference to the net loss of profits which they alleged that they would have earned during the additional two-year extension. The question deliberated in that case was essentially a question of mitigation and assessment of profit. The
F question of law formulated for the Supreme Court's deliberation can be found at para 14 of the report in this way:

> When assessing shipowners' damages for loss of profits on earnings of hire under a time charterparty which has been repudiated by the charterers and the repudiation
G accepted by the owners as terminating the contract, are the charterers entitled to have taken into account as diminishing the loss of earnings/hire sustained by the owner as a result of the accepted repudiation 'a benefit' said to consist of avoidance of a drop in the capital value of the vessel because the vessel has been sold shortly after acceptance of the repudiation whereas, if the vessel had been retained until after performance of the charterparty, it would have had a lower capital value by
H reason of decline in the capital value of the vessel through market decline in ship values in that period?

[50] It is of the considered view that in *Fulton Shipping* a very fine point of discussion relating to admiralty law where a repudiation of a contract which
I was accepted and the innocent party claimed damages were elucidated in that case which distinguishes the matter therein with the present matter where land is involved. The fact of that case is different altogether with the issue herein and the question of causal link discussed in that case does not take the matter raised herein any further.

[51] The causal link in the present matter is found in none other than the judgment of the learned High Court judge. It is repeated that the learned High Court judge found that:

> This statement made by DW1 in his witness statement evidence that the transaction included the land as the value of the shares is intricately linked to the value of the land.

[52] The judgment of the High Court has not been reversed or set aside by the Court of Appeal or the Federal Court. The finding of the learned judge quoted in the above paragraph has not been specifically reversed. From the evidence adduced during the trial, the learned High Court judge was satisfied that the plaintiff and the first defendant have discussed both the value of the shares and the land. The learned High Court judge then found as follows:

> However due to the existence of the SPA between the first defendant and the third defendant, specific performance may not be appropriate in this case such that the alternative claim will be allowed. It is my finding therefore that the compensation recoverable by the plaintiff from the first defendant in lieu of an order of specific performance in this case is the sum of RM841,691,94 being expenditure incurred.

[53] The plaintiff succeeded in their claim except for the specific performance. The plaintiff was the one who appealed against that part of the judgment of the learned High Court judge stated in the above. Nowhere in the judgment of the Court of Appeal stated that the sale and purchase agreement ie the HKM was not about the land. The Court of Appeal specifically dealt with only the issue of the plaintiffs appeal/claim as to the specific performance. The Court of Appeal stated:

> [8] Before we embark upon a detailed consideration of the appeal, it is necessary to draw attention to one aspect of the proceedings before this court, which we think, requires special mention. This is with regard to the event which took place after the High Court's decision was delivered. To be specific, during the pendency of this appeal, the shares, it transpired, had been transferred to a third party. We shall deliberate upon this significant event in turn as it has a bearing on the outcome of this appeal in view of the direction which the respondents have adopted in the course of their oral submissions during the hearing of this appeal.
>
> [9] At this stage, we will allude briefly to the main points in the appellant's appeal which focus on, firstly, the issue of the appellant's claim for specific performance which it has submitted, the learned judge had erred in disallowing it and, secondly, the order for the payment of damages in lieu thereof which according to the appellant was erroneously decided. This appeal also turns upon the questions whether the walker SPA was a sham agreement and the learned judge had erred in law and on the fact when she dismissed the claim for conspiracy between the respondents by failing to consider the factual circumstances surrounding the execution of the same.

A [10] It would be useful to remember that the position adopted for the respondents is described in this court by their counsel in the written submissions. In summary, it is contended that specific performance of the purported sale and purchase of the shares ought not to be granted. The respondents advanced several grounds for this submission one of which is that the shares, being the subject matter of the purported
B contract, are no longer available that is the first respondent no longer owns the shares. We make specific reference to this ground in view of our earlier emphasis on, and of its connection with, the sale of the shares in the second respondent to the third party. Save for this ground, *we shall not delve into all the other grounds as we do not find it necessaty to do so for the reasons that we shall give in due course*.

C ...

The respondents take up this preliminary point as understandably, the entire appeal is only against part of the High Court's decision in disallowing specific performance. There is without Question, no appeal against the High Court's decision in granting damages in lieu of specific performance to be assessed ... (Emphasis added.)

D

[54] This court further finds that nowhere in the remaining part of the judgment of the Court of Appeal that states the sale and purchase between the plaintiff and the first defendant was not for the land. All that the Court of
E Appeal considered was that the shares have been sold and as such the specific performance sought by the plaintiff as the appellant therein cannot be granted. The entire judgment of the Court of Appeal did not consider any other issues dealt by the learned High Court judge. There was also no appeal lodged by the first defendant against the decision of the learned High Court judge.

F

[55] The first defendant fails to support its contention on the issue of the nature of damages to be assessed herein.

G **[56]** Moving on, the loss on the part of the plaintiff is found in the judgment of the learned High Court judge as follows:

> On evidence, the change in solicitor on the eve of the scheduled signing and the increase in price is irrefutably suspicious and tainted with mala fide with the clear intention of depriving the plaintiff of the valuable asset, the shares and land

H

[57] The specific performance is as per the terms of the HKM. It cannot be denied and the truth is, the loss on the part of the plaintiff as found by the learned High Court judge is the land which was supposed to be sold to them but was sold to the third defendant instead. The specific performance is for the
I land and that is what the High Court had found the plaintiff is deprived of. On the facts of the case herein, there is only one asset, the land. If the issue is not the land, the question of quit rent would not have been discussed and considered by the parties during their negotiations. Apparently, there is the value of the shares then: it was US$25m as stated in the HKM which sum has been

deducted and done. Further, this court finds in the judgment of the learned High Court judge, via the emails, the court has considered the question of liabilities at the material time.

[58] The judgment of the High Court which was upheld by the Court of Appeal subsumes everything in the plaintiffs statement of claim. This is a case where the plaintiff as a developer wanted to buy the land and develop it and by the entire transactions the issue of the shares of the second defendant where the price and all the details including the liabilities and value of the land had been worked out. The true nature of the transaction is the land. If it is purely the sale of shares, there is nothing in principle to stop the High Court judge from granting the plaintiff the specific performance. The causation point has been ventilated and the findings have been made accordingly. As submitted by the plaintiffs learned counsel, it was done and dusted. What is before this court is purely the issue of quantum and not the causation anymore,

[59] This court's attention is brought to the judgment of the Court of Appeal in *Lee Tiow Kee & Anor v Ng Geok Hwa* [2017] 4 MLJ 92. This court agrees with the plaintiffs learned counsel's submission that that case is squarely on point with the present matter. That case dealt with the sale of land which went through but at the High Court stage, the specific performance was refused. The Court of Appeal reversed the High Court's decision but specific performance cannot be granted as the land was sold to a third party. Since specific performance being an equitable relief and cannot be granted in vain, the Court of Appeal in granting the damages in lieu of specific performance held that the appropriate date for the assessment of damages of the loss is the date of the subsequent sale of the land to the third party. The Court of Appeal stated:

> [4] The principle issue argued before us in this appeal was what was the relevant date for the computation of damages.
>
> ...
>
> [23] On the facts of the instant case, the respondent had attempted to have the contract completed by filing the suit in the High Court. However, it was discovered later that the land had been sold to Regent on 27 April 2012. Hence we were of the view that the effective date of assessment of damages shall be the date of the subsequent sale of the property by the appellant to Regent. In the circumstances of the case, we felt this would be just and reasonable to all parties herein. In our view, 27 April 2012 was the date when the contract was actually lost.

[60] On the facts of the present matter, the plaintiff had contracted to purchase the entire issued and paid up shares in the second defendant via the HKM for a sum of US$25.3m. However, the specific performance was refused by the learned High Court judge due to the third defendant and the second defendant SPA on 11 September 2012. As such, the damages to be assessed is

from 11 September 2012 being the date the HKM was lost where the plaintiff was deprived of the opportunity to purchase and thereafter develop the land to complement its existing development surrounding the land. It follows therefore, that if the second defendant did not enter into the SPA with the third defendant, the specific performance would have been granted. The second defendant's shareholding is entirely held by the first defendant and accordingly, the second defendant would not have entered into the SPA with the third defendant unless approved by the first defendant who controls the second defendant.

[61] In computing the damages, the sole question before this court is; what is the value of the land. The evidence of the expert therefore comes in. It must be stressed that the expert is not in a position to say that the plaintiff has lost something. The role of the expert is merely to value the land and that is all.

[62] The requirements of expert's evidence are provided for in O 40A r 3 of the ROC as follows:

> 3 Requirements of expert's evidence (O 40A, r 3)
>
> (1) Unless the Court otherwise directs, expert evidence to be given at the trial of any action, is to be given in a written report signed by the expert and exhibited in an affidavit sworn to or affirmed by him testifying that the report exhibited is his and that he accepts full responsibility for the report.
>
> (2) An expert's report shall —
>
> (a) give details of the expert's qualifications;
>
> (b) give details of any literature or other material which the expert witness has relied on in making the report;
>
> (c) contain a statement setting out the issues which he has been asked to consider and the basis upon which the evidence was given;
>
> (d) if applicable, state the name and qualifications of the person who carried out any test or experiment which the expert has used for the report and whether or not such test or experiment has been carried out under the expert's supervision;
>
> (e) where there is a range of opinion on the matters dealt with in the report —
>
> (i) summarise the range of opinion; and
>
> (ii) give reasons for his opinion;
>
> (f) contain a summary of the conclusions reached;
>
> (g) contain a statement of belief of correctness of the expert's opinion; and
>
> (h) contain a statement that the expert understands that in giving his

report, his overriding duty is to the Court and that he complies with that duty.

[63] The plaintiff has commissioned Messrs Jones Lang Wotton, a registered valuer to determine the market value of the land. The valuation report is marked as 'R1' in encl 188. Based on the valuation conducted, the total market value of the land with vacant possession is estimated to be:

(a) RM180m as at 11 September 2012; and

(b) RM412m as at 31 July 2017.

[64] The valuation report was prepared in accordance with the Manual of Malaysian Valuation Standards issued by the Board of Valuers, Appraisers and Estate Agents, the International Valuation Standards Committee and the Royal Institution of Chartered Surveyors Appraisal and Valuation Manual. The market value guide was taken into account by the expert. A comparison approach was carried out as the valuation methodology to determine the market value of the land and the expert has considered the sale transactions of other properties of similar nature in arriving at his opinion.

[65] The valuation as at 11 September 2012 is based on sale transactions of three comparable lots. The three lots relate to the land intended for development purposes. The valuation as at 31 July 2017 is based on the sale transactions of four comparable lots. There is comparable involving Nusajaya Rise Sdn Bhd and Scope Energy Sdn Bhd for example, which are also in respect of six parcels of uncontroverted development land.

[66] Various enquiries, searches and investigations were carried out to identify the particulars of titles of the land. Site inspection was carried out at the land and several inquiries were conducted at the Johor Darul Takzim Land Registry in respect of the component lots forming the land.

[67] The expert adopted a sum of RM10,000 being the license fee of golf membership for the club in 2012 per membership as compensation sum to each member in order to obtain vacant possession of the land. The expert adopted the land areas as stipulated in the land titles of the land to calculate the value of the land.

[68] In arriving at his opinion, the expert relied on the following documents annexed to the report:

(a) Schedule 1 — General Principles of Valuation and Limiting Conditions;

(b) Schedule II — Land searches carried out at the land Office on 23 January 2018;

(c) Appendix A — General location plan of Poresia Country Club in relation to Leisure Farm Resort, Iskandar Puteri (Bandar Nusajaya) and Johor Bharu city centre, the Second Link, the existing roads and highways linking Malaysia to Singapore;

(d) Appedix B & C — Approximate location plans of Poresia Country Club;

(e) Appendix D — Illustrative layout plan showing Poresia Country Club and the surrounding developments;

(f) Appendix E — Site Plan; and

(g) Appendix F — Comparable Plan ie approximate location plan of the Golf Course Land in relation to sale comparables.

[69] There is indeed a comprehensive, structured and well-reasoned report before this court for the purpose of the assessment herein.

[70] The expert report is not rebutted both on evidence of facts and opinion. There is no conflicting evidence before this court. There is no indication to cross-examine the expert. The ROC provides for avenue for the first defendant to put questions to the expert on the content of the report to which the first defendant has not avail itself to such provision. Order 40A r 4 states:

4 Written questions to expert (O 40A, r 4)

(1) A party may with the leave of the Court put to an expert instructed by another party written questions about his report.

(2) An application for leave to put questions to an expert about his report shall be made within fourteen days of service of the expert's affidavit exhibiting his report, or such longer period as the Court may allow.

(3) The written questions under paragraph (1) shall be for the purpose only of clarification of the report.

(4) An expert's answers to the written questions put to him under paragraph (1) shall be in writing and provided within such time as the Court may direct and shall be treated as part of the expert's report.

(5) Where a party has put a question to an expert instructed by another party in accordance with this rule and the expert does not answer the question or does not, in the opinion of the Court, answer the question adequately within the time provided, the Court may make such order as it thinks just, including all or any of the following:

(a) that the party who instructed the expert may not rely on the evidence of that expert;

(b) that the party who instructed the expert may not recover the costs of that expert from any other party; or

(c) that the expert is to answer or provide a further and better answer to the question, as the case may be.

[71] This court accepts that there is no challenge to the plaintiffs affidavit and expert report demonstrating the first defendant's acceptance of the expert's evidence.

[72] In the case of *Kamdar Sdn Bhd v Bipinchandra a/l Balvantrai & Ors* [2016] MLJU 974; [2017] 1 CLJ 369, Nallini Pathmanathan JCA (as Her Ladyship then was) opined as follows:

(vi) the case law in relation to the acceptance and rejection of an expert opinion is well set out in the Singapore case of *Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] 1 SLR 408 where the Singapore Court of Appeal in discussing the evidence of a professor of botany on the age of a belimbing tree in a dispute involving a claim of adverse possession stated:

> It is true that the age of the Belimbing tree, being 20 years old, was only an estimate. Because it was an estimate, the trial judge could not accept the evidence of Prof Rao. In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds: see *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1 at pp 8–9. We did not think just because the age given was an estimate, that that in itself was a good ground to reject the expert opinion. In the realm of expert evidence, it invariably involves a matter of judgment. This was a scientific issue outside the learning of a judge.

(vii) the foregoing case was considered in the Malaysian case of *Majuikan Sdn Bhd v Barclays Bank pic* [2015] 1 MLJ 171; [2014] 9 CLJ 337 where this court cited with approval the passage from Dr Lo Sook Ling Adela:

> We are in agreement with these principles and in our view, a judge who is not an expert himself should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, *but where there is only one expert opinion he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case*.

And as stated in the case of *Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR 983:

> 76 *What is axiomatic is that a judge is not entitled to substitute his own views for those of an uncontradicted expert's: Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1. *Be that as it may a court must not on the other hand unquestioningly accept, unchallenged evidence. Evidence must invariably be sifted, weighed and evaluated in*

A *the context of the factual matrix and in particular the objective facts.* An expert's opinion 'should not fly in the face of proven extrinsic facts relevant to the matter' per Yong Rung How CJ in *Dr Khoo James v Gunapathy d/o Muniandy* [2002] 2 SLR 414 at [65]. *In reality, substantially the same rules apply to the evaluation of expert testimony as they would to other categories of witness testimony. Content credibility, evidence of partiality, coherence and a need to analyse the evidence in the context of established facts remain vital considerations*: demeanour however more often than not recedes into the background as a yardstick. (Emphasis added.)

B

C **[73]** Matters of content, credibility, evidence of partiality, coherence and a need to analyse the evidence as cited by the learned judge in the above excerpts are matters to be responded and challenged via affidavit evidence without which the expert evidence herein stands.

D **[74]** By way of submission, the first defendant states that the expert's report is of no assistance to the court as it is argued to be presumptive and speculative. The case of *Majlis Amanah Rakyat & Anor v Mat Nawi bin Awang and another appeal* [2017] 1 MLJ 500 is cited where the Court of Appeal set aside the award for damages granted by the High Court on the basis that it was based on evidence that was considered 'unsafe'. Zamani A Rahim JCA (as he then was) held as follows:

E

> Be merely relying on exh P2 which is purely a mere estimation, speculation and assumption without proof of actual loss it would indeed be unsafe to allow the respondent's claim of RM3,627,360. As the respondent could not prove his loss of earning as required by law, he was therefore entitled to nominal damages only.

F

[75] In attacking the expert report, the first defendant refers to item 7.0 of the report at p 25 in so far it is relevant to the argument as follows:

G

> 7.0 PLANNING DETAILS
>
> The component lots forming the subject property are designated for use as Padang golf as stipulated in the respective title of documents as well as per the master layout plan (amended) of Leisure Farm Resort, which had been approved on 16th February 2011.

H

> ...
>
> Based on our informal enquiry at the Planning Department of Majlis Bandaraya Iskandar Puteri (formerly known as Majlis Perbandaran Johor Bahru Tengah) we were advised that favourable consideration will be given for the component lots forming the subject property to be re-zoned and converted for mixed development in the event or re-development of the golf course, subject to approval by the State Authority.

I

> Accordingly, our valuation is on the premise that the subject land can be re-developed for mix development in accordance to the permissible development

components as stipulated in the Rancangan Tempatan Daerah Johor Bahru, 2020 (Pengubahan) Blok Perancangan 6; Nusajaya, Kelas Kegunaan Tanah BPK 6.13: Presin Leisure Farm.

[76] Based on the above excerpts of the report, it is contended that the expert opinion at its best is presumptive and/or assumptive since the opinion is based on the expert's 'informal enquiry at the Planning Department' and there is no evidence that the expert had made any formal inquiry.

[77] The other point taken up by the first defendant relates to the RM10,000 compensation to each member of the club to obtain vacant possession of the said land which is also submitted to be presumptive and/or assumptive. It is contended that the report offers no explanation on how the figure of RM10,000 was arrived at and the bases upon which the expert believes that the compensation sum would be agreeable to the members of the club.

[78] At p 12 of the expert report, the expert states:

> For purposes of this valuation, we were also specifically instructed by the Client to adopt RM10,000 as the compensation sum to each member in order to obtain vacant possession of the land. We were given to understand by the Client that the selling price/license fee of individual golf membership for Poresia in 2012 was about RM10,000 and that Poresia have since ceased selling memberships for the past few years.

[79] The statement in the above is a fact which is unrebutted. The expert was informed by the plaintiff of that fact and has given the information on oath. The first defendant has elected not to challenge or dispute that statement of fact by way of an affidavit and as such there is no room to depart from what the expert has acted on or based upon in giving the opinion as to the valuation.

[80] The plaintiff as the client is allowed to adduce statement/fact/information on its believe with the grounds thereof. Order 41 r 5 of the ROC allows such statement to be made in affidavits and the fact the expert report is an exhibit referred to in the affidavit, it forms part of the affidavit. Order 41 r 5 of the ROC states:

> 5 Contents of affidavit (O 41, r 5)
>
> (1) Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> (2) An affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information of belief with the sources and grounds hereof.

[81] As to the informal inquiry, the expert cannot make a formal inquiry for permission to develop or re-zoning of the land from the land office. Only the owner of the land could do so. The plaintiff is not the owner of the land as the first defendant has breached the contract and as such the question of formal inquiry does not arise at all.

[82] The first defendant's learned counsel relies heavily on the Court of Appeal decision in *Lim Tze Sian v Coverright Surface Malaysia Sdn Bhd*. The fact of that case is different from the present matter. In that case, there were several exhibits involved and the exhibits were what the Court of Appeal dealt with proper appreciation. Further there were also contesting affidavits before the court. The Court of Appeal stated that the court cannot accept the exhibits just at the face value but must scrutinise them and consider whether the exhibits stand up to crucial scrutiny. The Court of Appeal through the judgment of Mary Lim JCA found and stated as follows:

> [23] Although the learned SAR had stated that he had taken into account the respondent's loss as reflected in the exhibits, it would appear that the exhibits were not properly scrutinised by the SAR. If at all there was any examination, it was at best, superficial and cursory. Had the learned judge veri fied the findings of the SAR against the evidence led, the learned judge would have found that those findings are not in the least supported by that evidence. The learned judge would then have exercised her appellate powers and intervened. The High Court necessarily had to do that as the SAR's reasons were too broad brushed and generalised, and not fact specific. As Her Ladyship had failed to do that, we are obliged to intervene and put right the matters that ought to have been righted in the first place. With respect to both the learned SAR and thereby the learned judge, both may have been sidetracked by the reduction of the amount claimed, from around RM18.3m to RM1m. We have examined the affidavits and the exhibits attached and we cannot see how any of the figures mentioned therein represent any loss, be it loss of revenue or loss of profit. We certainly cannot see how any of the figures are tied up with the appellant such as to render the appellant liable to pay the sum claimed by the respondent.
>
> ...
>
> [25] The respondent's allegations were repeated in the affidavit of Woo Pek Chuan, a director of the respondent (see pp 77–87 of the record of appeal). In support of his allegations, Woo offered nine exhibits of which exhs WPC4 to WPC9 pertain to the matter of loss. Exhibit WPC4 is the respondent's comprehensive audited statements of accounts for the financial years of 2011 and 2012; while exh WPC5 is the respondent's collective yearly sales analysis for the years 2010, 2011 and 2012. The next exhibits of WPC6, WPC7 and WPC8 are the analysis of sales to specific companies of Longland International Co Ltd, Jang Mei Industry Co Ltd, Tai Bong Furniture Sdn Bhd and Metro MDF Co Ltd for various years from 2010–2012. Then, there is exh WPC9 which is a proforma invoice dated 30 November 2011 from Longland International Co Ltd. This invoice was signed by one Patrick Teoh

or Teoh Chi Being, a former sales manager of the respondent. Teoh resigned around the time the appellant left the respondent's employment. Teoh subsequently joined Siam Paper Decor.

[26] All these exhibits are said to show a significant drop (penurunan mendadak) in the respondent's revenue from RM95,380,000 in 2010/2011 to RM83,327,000 in 2011/2012; and to RM71,105,710.72 in 2012. These exhibits also show a similar drop in the respondent's sales within a period of two years from the appellant's resignation or cessation of employment with the respondent. The respondent claimed that these significant declines in its financial figures were a direct consequence of the appellant's act of sabotaging the respondent's business.

...

[49] Similarly, we find that there was no proper consideration of the compensation claimed. There were so many real and serious discrepancies that were not clarified and explained away by the learned SAR in the terms discussed. Assessment of damages is a critical stage in the evaluation of any claim before the court. Inasmuch as the primary question of liability warrants careful consideration of the law and proper application of that law to the facts, so is the assessment of damages. Such exercise can sometimes be tedious as a mountain of 'information' is thrown at the court as purported evidence and justification for the claim. That is quite wrong. Parties must carefully prove their claim, and the court must evaluate the contentions, consider if the evidence brought is indeed relevant, true and supportive of the claim, no matter how difficult or cumbersome. It is not enough for a court, especially one sitting at first instance, to simply say that it is satisfied that the claim is proved or not proved. Reasons must be articulated to explain why various pieces of evidence were either considered or not considered; and why and how the submissions from both counsel on the same were treated. On appeal, the High Court must evaluate that decision to see if it is borne out by the record.

[50] None of this was conducted here. We have had to conduct that exercise here and we have found the decision of the learned judge wanting. All this has led to an erroneous estimation of the respondent's claim for general damages in the form of loss of profits. This misdirection resulted in a failure of justice which was not addressed by the learned judge; and which we must now put right.

[83] This court is not in the position to substitute its own views for the uncontested expert's opinion. Even if this court would want to question the evidence, the content, the credibility, partiality, coherence and to analyse the evidence (*Kamdar Sdn Bhd v Bipinchandra a/l Balvantrai & Ors*), based on the established facts, there must be before this court cross examination or rebuttal to challenge the expert evidence. The plaintiff's expert affidavit complied with the requirements laid down in O 40A r 3 of the ROC. Accordingly, this court is satisfied that the plaintiff's expert has discharged the duty to the court and it must be taken into account. The expert evidence is uncontroverted and as such it is evidence in support of the assessment herein.

[84] This court is satisfied that the plaintiff has discharged its burden in proving the actual damage and loss suffered as a result of the first defendant having breached the HKM. Accordingly, the expert report remains un-assailed.

[85] The plaintiff is entitled to a sum of RM101,570,000 being the actual damage and loss it suffered as at 11 September 2012. The sum of RM101,570,000 represents the difference between the market value of the land as at 11 September 2012 which is RM18m and the consideration set out under the HKM which is US$25.3m. Based on the exchange rate of 3.1000 on 11 September 2012 from the Central Bank of Malaysia, US$25.3m is equivalent to RM78,430,000. The plaintiff filed an affidavit disclosing facts as to the exchange rate from US$ to Ringgit Malaysia ('RM') as at 11 September 2012. The defendant took objection on the filing of the affidavit as it was filed after all the affidavits have been exhausted pursuant to the court's directions and just before the hearing for the assessment herein. The plaintiff withdrew the affidavit. In *Inter Diam Pte Ltd v PJ Diamond Centre Sdn Bhd* [2002] 7 MLJ 189; [2002] 4 CLJ 715 where the equivalent amount in RM was not stated in the alternative claim in the statement of claim, Hishamudin Mohd Yusof J (as he then was) opined that such alternative claim in that manner (ie without actually specifying the amount in RM) is legally proper and the date of conversion can either be the date of judgment or the date of payment. The plaintiff has stated the conversion in its submission. The first defendant has not taken up any objection as to the exchange rate submitted by the plaintiff. This court finds no reason not to accept the conversion rate as submitted by the plaintiff (in its written submission).

[86] This court is of the considered view that the sum is fair and reasonable to compensate the plaintiff for the loss of value of the land as at the date of breach on the part of the first defendant of the HKM and it would put the plaintiff in the position in which it would have been in had the first defendant not breached the HKM.

Enclosure 181

[87] Upon careful perusal of the third defendant's affidavits, it can be seen that the damage/loss suffered by the third defendant is for loss of revenue as a result of the caveat lodged by the plaintiff. In its two affidavits filed herein, the third defendant merely lists down the losses it alleges to be its damages without exhibiting any documentary evidence to substantiate its claim. In *Mawar Biru Sdn Bhd v Lim Kai Chew* [1992] 1 MLJ 336, the High Court made no award for damages in absence of proof of actual loss on the part of the defendant in a case concerning assessment of damages for wrongful lodgment of caveat pursuant to s 329(1) of the National Land Code. James Foong JC (as he then was) stated:

Damages as submitted by the defendant's counsel, with which I am in total agreement, must be real and actual in this case. In order to prove it, the burden is on the defendant (see the case of *Ashcroft v Curtin*). As far as this case is concerned, the defendant has failed to prove actual loss and I accordingly make no award for damages.

[88] Relevant extract of the third defendant's affidavit are highlighted to this court by the plaintiff and they are as follows:

8.1 The total sellable area for the semi-d is 378,000 square feet (sqft).

(a) If the semi-d homes would have been launched in June 2013 at RM500 per sq ft, the total selling price for the semi-d home would have been RM2,100,000.00 per unit.

(b) If the semi-d homes had been launched in June 2013, the revenue that could have been derived is RM189,000,000.00.

8.2 The total sellable area for the cluster homes is RM347,2000 sq ft.

(a) if the cluster homes would have been launched in June 2013 at RM435 per sqft, the total selling price for the cluster home would have been RM1,348,000.00 per unit.

(b) if the cluster homes had been launched in June 2013, the revenue that could have been derived is RM151,000,000.00.

8.3 As for now however, the semi-d and cluster homes can only be sold for 20% less compared to their prices in June 2013.

8.4 With these new prices the revenue for the semi-d homes have been reduced from RM2,100,000.00 per unit to RM1,600,000.00 per unit and the prices of the cluster homes have reduce from RM1,348,000.00 per unit to RM1,100,000.00 per unit.

9. Therefore, I verily state that the total loss of revenue based on the above figures is at RM73,000,000.00 over the 3 years averaging at RM24,000,000.00 per year.

[89] As stated earlier, no contemporaneous document/evidence is adduced before this court. The third defendant is throwing everything to the court based on 'if'. There is no expert report to assist this court to demonstrate the market value of the land as at June 2013 and no documents evidencing intention on the part of the third defendant to develop the land with the terms and conditions of the SPA adduced before this court. Further, there is no document to show the depreciation in value of the sale of the cluster homes and/or the semi-detached homes between June 2013 and 2018. In the words of Edgar Joseph Jr J (as he then was) in *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360:

In an action for damages it is for the plaintiff to prove his damages, it is not enough to write down the particulars and throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages'. He has to prove it.

[90] This court finds that the third defendant fails to show the entry of the plaintiffs private caveat has caused the cluster homes and/or the semidetached homes to be sold at a lesser price. Failure on the part of the third defendant to come up with a valuation report is fatal. This court is unable to verify the amount sought by the third defendant as there is no reference to assist the court in making the assessment. In *Lo Foi v Lee Ah Hong @ Lee Lum Sow & Ors* [1997] MLJU 310; [1998] 1 CLJ Supp 244 the court stated:

> Of crucial importance, the defendants have failed to tender the valuation reports (a point that was repeatedly emphasised by Mr Clarence Edwin) to reflect the projected costs of the development of the said property and the profits that might accrue thereto. The defendants too did not call a seasoned developer as an expert witness to testify on such crucial matters — matters which would certainly enlighten the court on those apparent grey areas particularly when it involved a huge quantum. There should be a variety of contingencies that would usually occur in the course of developing the said property, for instance, there would be a shortage of building material, force majeure or even breach by contractors or even sub-contractors. These are matters which the defendants should anticipate and the defendants should show how these factors would have affected the proposed development on the said property. The defendants too did not give any evidence at all in regard to the specifications for the buildings, to wit, whether the proposed limits would be constructed using concrete or wooden structures, so submitted Mr Clarence Edwin. Indeed these are matters that cannot be assumed by the court and clear evidence should be led by the defendants. The profit margin of RM100,000 per unit for the shop lot and RM10,000 per unit for single storey low cost terrace house came out of no where. They seemed to have been plucked from the air. No evidence was adduced in regard to the profit margin at all.
>
> ...
>
> The defendants held onto the notion that the private caveat had caused 'actual damage' to the said property. The plaintiff argued to the contrary. There was no evidence, be it through valuation report or otherwise, to show that the said property had depreciated in value subsequent to the lodgment of the private caveat. The defendants purchased the said property in 1979 in the region of RM100,000 and by 9 June 1995 it yieided a value of RM593,000.
>
> The defendants submitted that they were prevented from enjoying the fruits of their proposed development of the said property and drew an analogy with the decision enunciated in *Mawar*. There the learned judge said that damages were recoverable for the loss of the use of the balance of the purchase price where such balance was contractually due to the proprietor but had not been paid by the purchaser because a caveat had been lodged. With respect, *Mawar* cannot support the defendants' claim for loss of profits from the proposed development. The learned judge there refused to grant damages based on speculative proceeds of the sale of the land. There the learned judge also found that the damages were too speculative as the claimant himself refused to sell the property after the caveat had been lifted. There the learned judge further ruled that there was no conclusive proof that the claimant had suffered the losses which the claimant had claimed. Here too, the defendants have failed to conclusively prove that they were entitled contractually to receive the amounts sought for or for that matter that they would have obtained such profits from the

proposed development. Here too the defendants failed to adduce evidence in the form of valuation reports and this failure must be treated as fatal.

[91] When the question involves is beyond the range of common experience or knowledge or when special study of a subject or special training or experience is necessary, expert report is required to assists the court (per Abdul Hamid FJ (as he then was) in *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19).

[92] In *U Television Sdn Bhd & Anor v Comintel Sdn Bhd* [2017] 5 MLJ 292, the Federal Court in reference to *Syed Abu Bakar bin Ahmad v Public Prosecutor* stated as follows:

[45] In the context of the present case we are of the view that expert evidence was required. The plaintiffs witnesses, namely PW2 and PW3 were witnesses of facts and could not be characterised as experts. It was not, but was found by the learned High Court judge, a question of accepting the testimony of plaintiff's witnesses PW2 and PW3 and disbelieving the testimony of the defendants' witnesses, DW1 and DW2, on the issues raised. There being no expert evidence, the learned High Court judge was in no position to make a determination of these technical issues. On this point, we would like to refer to the observation made by Abdul Hamid FCJ (as he then was) in the case of *Syed Abu Bakar bin Ahmad v Public Prosecutor* [1984] 2 MLJ 19 at p 23 as follows:

> Our law is clear in that under s 45 of our Evidence Act 1950 it is provided that ... The scope of this section can be found in the commentary in Sarkar on Evidence (12th Ed) at p 488 where, while recognising that opinion in so far as it may be founded on legal evidence shall be the function of the tribunal whose province alone it is to draw conclusions of law or fact:
>
> > There are however cases in which the court is not in a position to form a correct judgment without help of persons who have acquired special skill or experience on a particular subject, eg when the question involved is beyond the range of common experience or common knowledge or when special study of a subject or special training or special experience therein is necessary. In such cases the help of experts is required. In these cases, the rule is relaxed and expert evidence is admitted to enable the court to come to a proper decision.
>
> ...
>
> ... Since the document was not examined by any person who has acquired a special skill or expert in the particular subject, ie handwriting, the question therefore is was the learned High Court judge right in making the finding of fact that he did in the absence and without the aid of expert evidence?
>
> ...
>
> It is settled principle that while it is true that a judge who sits alone is entitled to weigh all the evidence, to put his own magnifying glass to determine the probabilities so to speak and form his own opinion or judgment, it would be

A erroneous for him to form a conclusion on a matter which could only be properly concluded with the aid for expert evidence. (Emphasis added.)

...

[47] The decision of Mohamed Azmi SCJ in *Junaidi bin Abdullah v Public Prosecutor* [1993] 3 MLJ 217 is also relevant and instructive on the need to call expert evidence wherein His Lordship had this to say.

> In our view, the test to be applied for the purpose of s 45 of the Evidence Act 1950 is this. First, does the nature of the evidence require special skill? Second, if so, has the witness acquired the necessary skill either by academic qualification or experience so that he has adequate knowledge to express an opinion on the matter under enquiry? The answer to both questions must necessarily depend on the facts of each particular case. The specialty of the skill required of an expert witness under s 45 would depend on the scientific nature and complexity of the evidence sought to be proved. The more scientific and complex the subject matter, the more extensive and deeper will the court be required to enquire into the ascertainment of his qualification or experience in the particular field of art trade or profession. (Emphasis added.)

[48] It was submitted for the plaintiff that if the first defendant held the view that expert evidence was relevant and necessary to prove the compatibility between versions 3.8(a) and 3.8(b) it was for the first defendant to call such independent technical witness. With respect we could not agree with such a contention.

...

[50] The High Court found that there was a need for technical evidence but, however, it preferred the evidence of the plaintiff on the basis of its so-called technical witnesses. It is our judgment, when it was determined that there was a need for technical evidence, it was incumbent on the plaintiff to lead evidence through experts. It did not do so and by reason of that failure had failed to discharge its 'burden of proof under ss 101 and 102 of the Act. Consequently the 'onus of proof did not shift to the defendants to dislodge the assertions made by the plaintiff as the claimant.

[93] The plaintiff is found to have credibly denied the material evidence in the third defendant's affidavits. In fact, this court finds that there is in actual fact no undisputed facts before this court to determine the assessment herein in favour of the third defendant.

[94] Further, upon reading the SPA entered into between the third defendant and the second defendant, there are apparently five preconditions in cl 3 to be fulfilled. In other words, the SPA is a conditional contract which will not become enforceable until all conditions are fulfilled. The five pre-conditions are reproduced:

> 3.1.1 the withdrawal or the removal by the Vendor at its own cost and expense of the Private Caveat entered by the Caveator in respect of HS(D) 195059 (hereinafter referred to as the 'Withdrawal and Removal of Private Caveat');

3.1.2 the granting of a limited power of attorney in form and substance as described in Schedule C hereof by the Vendor to the Purchaser empowering the Purchasers to submit the application for the subdivision and conversion approval (as defined herein), planning approval, building plans approval, infrastructure plans approval, environmental impact assessment and traffic impact assessment (hereinafter referred to as the 'Power of Attorney');

3.1.3 the vendor procuring the approvals of the appropriate governing authorities including the approval of the Registrar of Companies (hereinafter referred to as the 'CCM Approval') and the approval of the trustee (hereinafter referred to as the 'Trustee Approval') and the approval of the members of the Pore-Sia Country Club (hereinafter referred to as the 'Members Approval') for the deletion of 9 holes from the 36 holes within Pore-Sia Country Club;

3.1.4 the Purchaser with the assistance of the vendor obtaining the approval of the Relevant Authorities for the subdivision and conversion of the said Land (hereinafter referred to as the 'Subdivision and Conversion Approval') and the issuance of separate documents of title to the subdivided lots (the subdivision and conversion approval and the issuance of IDT to the subdivided Lots are (hereinafter referred to as the 'Said Land Approval'); and

3.1.5 the Purchaser obtaining the approval from the State Authority in respect of the transfer of all the subdivided lots from the Vendor to the Purchaser (hereinafter referred to as the 'State Authority Approval') as required under Section 433B of the National Land Code 1965.

[95] There is no evidence before this court that any of the five conditions has been fulfilled. In fact, there is no evidence of intention to develop the land for that matter by reference to the terms and conditions of the SPA. The SPA was subject to conditions precedent to be fulfilled by the second defendant and/or the third defendant such as the execution of a power of attorney, the CCM approval, the members approval, the subdivision and conversion approval, the said land approval and the state authority approval. The fulfillment of the conditions precedents was subjected to an extension of time to be agreed by the second defendant and/or the third defendant in the event parties are unable to fulfil them within the first, second and/or the third cut off period(s)' as per cl 3.3.1 of the SPA. Accordingly, there is no documentary evidence to demonstrate that the SPA could have been completed within the period of nine months as averred by the third defendant in absence of proof that the conditions precedent has been applied for and/or rejected as result of the private caveat. There is nothing before this court to show that at any material time the third defendant did request for consent and/or approval to proceed with the development of the land before or after the removal of the caveat. No documentary evidence in a form of a layout plan to demonstrate that the semi-detached homes and the cluster homes can be developed on the land. In addition, there is no documentary evidence to demonstrate that the third defendant would have been able to launch the first phase of the development of the land in June 2013.

[96] It is the finding of this court that the third defendant fails to discharge the burden to prove the alleged damages and/loss. This court finds that the damages and/or loss suffered by the third defendant is speculative and at its highest, is purely an estimation. The deponent of the third defendant's affidavit is not an expert and the averments therein are bare averments. The letter from the trustee of the club is the sole evidence adduced and does not assist the third defendant as to its claim of the RM72,776,000.

[97] There is no evidence that the SPA ever become unconditional and enforceable and there is no evidence to demonstrate that the third defendant on its own had taken immediate steps to have the private caveat removed pursuant to ss 326 and/or 327 of the National Land Code.

[98] The third defendant has failed to mitigate its own loss. In the absence of contemporaneous documentary evidence to support the claim, the third defendant has failed to demonstrate any infringement of its right entitling it to damages nominal or otherwise. In *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708; [2016] 6 CLJ 508 the Court of Appeal in making no award of compensation at all stated as follows:

> [43] In the instant appeal before us, the plaintiff undeniably continued to be the landlord of the land. In any case there was no diminution in value to the land directly caused by the 'trespass' of the defendants to parts of the land; to the contrary, the overall land had appreciated in value in the interim. There was also no direct evidence adduced as to any costs of 'repairs' or of damages incurred by the plaintiff with respect to the parts of the land occupied by the defendants individually. As noted above there was also no evidence of what would be a fair rental that the plaintiff could have expected from the specific land, much less any apportionment of liability for any such loss of rental as amongst the individual defendants, with reference to the respective areas separately occupied by them. On all counts therefore, the plaintiff's claim for damages was unsustainable on evidence and ought to have been rejected outright.

[99] The party claiming damages bears the burden to prove the damages and/or losses suffered. The court must be vigilant in assessing damages for the wrongful entry of caveat. No award for damages must be made unless and until the aggrieved party has proved its actual loss. The Federal Court decision in *Jeffery Law Siew Su & Ors v Yu Gui* [2017] 3 MLJ 1 is instructive. The court stated as follows:

> [8] The fact that an inquiry/assessment of damages has been directed ... does not raise a presumption that damage has in fact been suffered' (*Fraser & Neave Ltd v Yeo Hiap Seng Ltd* [1988] 1 SLR 96 per Wee Chong Jin CJ). 'At the inquiry the onus is on the defendant to prove both the fact of damage and its causation (*Tharros Shipping Co Ltd v Bias Shipping Ltd* [1994] 1 Lloyd's Rep 577). The assessment is made on the same basis as that on which damages for breach of contract would be assessed if the undertaking had been a contract between the claimant and the

defendant that the claimant would not prevent the defendant from doing the act prohibited by the injunction (*F Hoffmann-La Roche & Co AG & Ors v Secretary of State for Trade and Industry* [1975] AC 295 at p 361, per Lord Diplock). The defendant must show that both the type of loss and any links in the chain of causation can reasonably be regarded as having been in the contemplation of the parties when the injunction was granted (Tharros Shipping case, above, per Waller J). Causation must be established not simply on a 'but for' basis; prima facie the undertaking must be shown to be the exclusive cause of the loss, though this does not mean that every conceivable or theoretical cause of the damage must be dealt with (*Triodos Bank NV v Dobbs and another ; Dobbs and another v Morrison and others* [2005] EWHC 108 (Ch), Lightman J)' (Injunctions by David Bean, Andrew Burns and Isabel Parry (11th Ed) at 6-07). There must be a causal link between the injunction and the damage suffered by the defendant (see *Sunseekers Pte Ltd v Joshua* [1990] 2 MLJ 350 per Chan Sek Keong J, as he then was). 'In the end ... the question becomes one of fact: did the making of the order cause the loss? The onus of proof must, in accordance with general principles, lie on the defendant who asserts that he sustained damage by reason of the order' (*Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1981) 33 ALR 578 per Gibbs J).

A B C D

CONCLUSION

[100] Premised on the evaluation and findings in the above, this court finds that the plaintiff is entitled to the sum demanded in this proceedings as follows:

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(a) RM101,570,000 as damages for the loss of value of land as at 11 September 2012;

(b) the actual fees of the valuer Jones Lang Wootton appointed by the plaintiff;

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(c) interest at the 5%pa on all the above amount; and

(d) costs of RM20,000 to the plaintiff to be borne by the first defendant.

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[101] The third defendant has failed to demonstrate any infringement of its right entitling it to damages nominal or otherwise. Enclosure 181 is dismissed with costs of RM7,000 to the plaintiff.

Order accordingly.

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Reported by Ashok Kumar

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